HAGEMEYER TRADING CO. (MALAYSIA) SDN. BHD. v. GIBSON TRADING CO. & ANOR.

[O.C.J. (Arulanandom J.) January 29 & June 17, 1981]
[Penang — Civil Suit No. 14 of 1976]

Practice and Procedure — Summary judgment — Specially indorsed writ — Allegation of fraud — Plaintiffs' affidavit did not disclose belief of no defence to action — R.S.C. 1957, O. 3 r. 6 & O. 14 r. 1A.

The plaintiffs sued the first and second defendants for $111,000 together with interest. Judgment against the second defendant was entered in default. The Senior Assistant Registrar gave the plaintiffs liberty to enter final judgment against the first defendant for $111.000 together with interest. The Senior Assistant Registrar held that there was no triable issue in view of the fact that in the invoices it was expressly stipulated:—

"Important: Our salesman have no authority to accept payment (other than by crossed cheques payable to the company)."

The first defendant appealed. He submitted that there had been non-compliance with O. 14 r. 1A, R.S.C. 1957. The supporting affidavit did not verify the cause of action and the amount claimed and did not state belief that there was no defence to the action. The amended statement of claim alleged fraud. Therefore the writ should not have been specially indorsed as O. 3 r. 6 expressly states that the writ can be specially indorsed in any action other than one which includes a claim by the plaintiffs based on an allegation of fraud.

Held, allowing the appeal: (1) a claim based on fraud is not specially indorsed; therefore the plaintiffs could not get leave to enter final judgment under O. 14 r. 1;

(2) in an applications for leave to enter final judgment under O. 14 r. 1, leave to defend ought to be given unless there is clearly no defence in law and no possibility of real defence on a question of fact. In the present case there were undoubtedly triable issues in law and in fact, and therefore the defendant should be entitled to defend the suit.

Cases referred to:-

(1) *Ryley* v. *Master and Sheba Gold Mining Co. Ltd.* v. *Trubshawe* [1892] 1 Q.B. 674.

(2) *Wilks* v. *Wood* [1892] 1 Q.B. 684.

(3) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

CIVIL SUIT.

Gan Teik Chee for the appellant/defendant.

J.B. Lim for the respondent/plaintiffs.

Cur. Adv. Vult.

Arulanandom J.: This was an appeal from the decision of the Senior Assistant Registrar giving liberty to the plaintiffs to enter judgment against the first defendant for the sum of $111,000 together with interest and costs.

The plaintiffs sued the first and second defendants for the sum of $111,000 together with interest at the rate of 12% per annum as from November 26, 1974 until date of payment and costs.

Judgment against the second defendant was entered in default on July 23, 1976.

On September 16, 1976 the plaintiffs applied by summons-in-chambers to the Senior Assistant Registrar for summary judgment under Order 14 and on October 14, 1976 the Senior Assistant Registrar gave the plaintiffs liberty to enter final judgment against the first defendant.

Again this decision the first defendants now appeal.

The Senior Assistant Registrar held that there was no triable issue especially in view of the fact that in the invoices it is expressly stipulated as follows: —

"Important: Our Salesmen have no authority to accept payment (other than by crossed cheques payable to the company)."

The appellant submits that there has been non-compliance with the Rules of the Supreme Court 1957 in that Order 14 rule 1A has not been followed in that:

(1) The application for summary judgment was made to the Senior Assistant Registrar instead of the judge;

(2) The supporting affidavit does not verify the cause of action and the amount claimed and furthermore does not state that in his belief there is no defence to the action.

In *Mallal's* Supreme Court Practice on page 139 under the heading "Stating there is no defence" appears the principle "This statement is essential and must not be qualified by any admission to part of the claim."

Furthermore the appellant urges the court that in the amended statement of claim there is allegation of fraud and in view of that the writ should not have been specially indorsed as Order 3 rule 6 expressly states that the writ can be specially indorsed in any action other than one which includes a claim by the plaintiffs based on an allegation of fraud.

In the cases of *Ryley* v. *Master and Sheba Gold Mining Co. Ltd.* v. *Trubshawe*[1] and *Wilks* v. *Wood*[2] it was held that where a writ of summons was indorsed under Order 3 rule 6 with a claim for a sum of money for interest thereon at 5% per annum from the date of writ till payment or judgment and it did not appear that the interest was claimed by statute or under any contract between the parties, then the plaintiff was not "seeking only to recover a debt or liquidated demand in money" within the meaning of Order 3 rule 6 and therefore the writ was not "specially indorsed" so as to enable him to obtain final judgment in the action under Order 14 rule 1.

Following the same line of reasoning a claim based on fraud is not specially indorsed and the plaintiffs cannot get leave to enter final judgment under Order 14 rule 1.

The appellant also submits that there are triable issues viz.

(1) Whether payment by cash cheques was good payment;

(2) Whether signing of invoices was only evidence of acceptance of delivery of goods or bound the acceptor to everything printed on it;

(3) As several cash payments had been accepted by plaintiffs whether there was waiver of conditions by plaintiffs;

(4) Whether first defendant was fraudulent.

In applications for leave to enter final judgment under Order 14 rule 1 leave to defend ought to be given unless there is clearly no defence in law and

no possibility of a real defence on a question of fact. (*Evelyn Saw Hee Li* v. *Gan Tit Sun*[3]).

In this case there are undoubtedly triable issues in law and in fact and therefore the defendant should be entitled to defend the suit.

The appeal is hereby allowed with costs.

Appeal allowed.

Solicitors: *Lim Huck Aik & Co.; Gan Teik Chee & Ho.*

PUBLIC PROSECUTOR v. PENGURUS, RICH FOOD PRODUCTS SDN. BHD.

[A.Cr.J. (Yusoff Mohamed J.) May 3, 1981]
[Johore Bahru — Criminal Appeal No. 12 of 1981]

Criminal Law and Procedure — Sale of Food and Drugs — Fish containing mercury — Whether strict liability offence — Scope of Sale of Food and Drugs Ordinance, 1952, s. 21.

The Inspector of Sale of Food and Drugs, Johore Bahru had taken possession of 6 packets of pure fish floss from a shopkeeper in the town on January 12, 1980. In compliance with the Ordinance he sent the fish floss to the Chemist for analysis. The Chemist's Report showed it to contain besides sugar, salt, bean sauce, vegetable oil, essence of taste, 1.7 parts per million of mercury. The Prosecution relied on the Chemist's Report when prosecuting the respondent. The respondent in her defence called the Chemist to testify on her behalf. The Chemist testified that all the ingredients used by the respondent did not contain mercury. He stated that the high content of mercury found in the floss came from the fish and met the other ingredients used in their natural state. He was also of the opinion that for the purpose of manufacturing fish floss, mercury had no useful function. He also said that unless mercury was deliberately introduced into the manufacture of fish floss, it could not have contained the high percentage of mercury as found in the floss.

The respondent said that she bought the fish for the purpose of manufacturing the said floss as well as all the ingredients used in its manufacture from the open market.

The learned magistrate acquitted the respondent on a charge under section 11(i)(b) of the Sale of Food and Drugs Ordinance 1952. He found that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent the duty to employ a Chemist to analyse the food she produced before marketing them.

The prosecution appealed.

Held, dismissing the appeal: this is not a strict liability offence and whether there is a defence open to the respondent is a question of fact to be decided by the magistrate; there was no reason to interfere with the finding of facts by the learned magistrate.

CRIMINAL APPEAL.

John O'Hara (Deputy Public Prosecutor) for the appellant.

Lai Poh Fye for the respondent.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an appeal by the Public Prosecutor against acquittal of the respondent Khor Get Kee, Pengurus, Rich Food Products Sendirian Berhad, Johore Bahru on a charge under section 11(1)(b) of the Sale of Food and Drugs Ordinance, 1952 for selling fish floss with label attached thereto not describing the contents which included among others, 1.7 parts per million of mercury, punishable under section 11(4) of the Ordinance.

The facts show that the Inspector of Sale of Food and Drugs, Johore Bahru had taken possession of 6 packets of pure fish floss from a shopkeeper in the town on January 12, 1980. In compliance with the Ordinance, he sent the fish floss to the Chemist for analysis. The Chemist's Report shows that the fish floss, besides containing sugar, salt, bean sauce, vegetable oil, essence of taste as described in the label, also contains 1.7 parts per million of mercury. The prosecution relied on the Chemist's report when prosecuting the respondent.

The respondent in her defence called the Chemist to testify on her behalf, who in his evidence said that he had examined all the ingredients used in the manufacture of the said fish floss and he found that all the ingredients used by the respondent did not contain mercury. In his opinion, the high content of mercury found in the floss came from the fish and not the other ingredients used in their natural state. He was also of the opinion that for the purpose of manufacturing fish floss, mercury has no useful function. He also said emphatically that unless mercury was deliberately introduced into the manufacture of fish floss, it cannot contain the high percentage of mercury as found in the floss.

The respondent said that she had bought the fish for the purpose of manufacturing the said floss as well as all the ingredients used in its manufacture from the open market.

Section 21 of Sale of Food and Drugs Ordinance provides a defence in that: —

"... it shall be no defence, that the defendant (respondent) did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance..."

This is not a strict liability offence and whether there is a defence open to the respondent under section 21 of the Ordinance is a question of fact to be decided by the Magistrate.

The learned Magistrate has found as a fact that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned Magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent, to employ a Chemist to analyse the food she produced before marketing them.

I see no reason to interfere with the finding of facts by the learned Magistrate and therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Jackson & Masacorale.*